

## 48A C.J.S. Judges § 366

Corpus Juris Secundum | August 2023 Update

### Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D.; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

### X. Special or Substitute Judges and Like Judicial Officers

#### C. Authority, Powers, and Duties of Special or Substitute Judge

## § 366. Assumption of authority by special or substitute judge after commencement of proceedings

[Topic Summary](#) | [References](#) | [Correlation Table](#)

### West's Key Number Digest

West's Key Number Digest, [Judges](#)  25

**A substitute judge should generally be allowed to enter a case after the proceedings have begun only under extraordinary circumstances and only after the substitute judge becomes completely familiar with the entire case.**

Generally, a substitute judge should be allowed to enter a case after the proceedings have begun only under extraordinary circumstances and only after the substitute judge becomes completely familiar with the entire case.<sup>1</sup> Thus, once the substitution of judges becomes necessary, the new judge should certify that he or she has familiarized him- or herself with the record of the trial.<sup>2</sup> The general rule is that a judge may not be substituted to preside over the remainder of a trial after evidence has been adduced before the original judge<sup>3</sup> although there is no bright-line rule that the substitution of a judge during any stage of trial constitutes reversible error.<sup>4</sup> It is also said that, generally, a judge should not be substituted over objection during the course of a criminal trial.<sup>5</sup> However, because the rule against the substitution of judges is meant to insure that a judge who hears testimony concerning the facts also applies the law thereto, the substitution of judges in the preliminary stages of a trial is permissible, and it is proper for one judge to preside during jury selection and another to conduct the remainder of the trial.<sup>6</sup> A statute prohibiting a judge from deciding or taking part in a decision on a question argued orally in the court when that judge was not present has been held not to bar a substitute judge in a criminal trial from deciding defendant's motion to set aside a jury verdict rendered before recusal of the original judge where the issue of the legal sufficiency of the evidence presents a pure question of law, the substitute judge makes clear that he or she has reviewed and is familiar with the prior proceedings, and defendant is not prejudiced by the decision.<sup>7</sup> Further, under some rules, a substitute judge may perform the duties remaining in an action after the findings of fact and conclusions of law are filed if the judge before whom the action was tried is unable to do so.<sup>8</sup> Also, substitute judges have been allowed where the tasks performed by them are simply ministerial or where the parties consent or

the appealing party fails to object.<sup>9</sup> If a successor judge is satisfied that he or she cannot perform the duties imposed by the rules of civil procedure with respect to the particular case, the successor is empowered to and must order a new trial.<sup>10</sup>

***Under Federal Rules of Criminal Procedure.***

Under the Federal Rules of Criminal Procedure, any judge regularly sitting in or assigned to the court may complete a jury trial if the judge before whom the trial began cannot proceed because of death, sickness, or other disability, and the judge completing the trial certifies familiarity with the trial record.<sup>11</sup> After a verdict or finding of guilty, any judge regularly sitting in or assigned to a court may complete the court's duties if the judge who presided at trial cannot perform those duties because of absence, death, sickness, or other disability.<sup>12</sup> The successor judge may grant a new trial if satisfied that a judge other than the one who presided at the trial cannot perform the posttrial duties or that a new trial is necessary for some other reason.<sup>13</sup>

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**Footnotes**

- 1 Ariz.—*State v. Wallen*, 114 Ariz. 355, 560 P.2d 1262 (Ct. App. Div. 1 1977).  
  
N.Y.—*People v. Gomez*, 103 Misc. 2d 352, 425 N.Y.S.2d 776 (County Ct. 1980).  
  
**Substitution in midst of presentation of evidence during jury trial permissible**  
Mass.—*Com. v. Carter*, 423 Mass. 506, 669 N.E.2d 203 (1996).  
  
**Judge pro tem adequately familiar with case**  
Ind.—*Malone v. State*, 700 N.E.2d 780 (Ind. 1998).  
  
**A.L.R. Library**  
Power of Successor or Substituted Judge, in Civil Case, to Render Decision or Enter Judgment on Testimony Heard by Predecessor, 84 A.L.R.5th 399.  
Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 A.L.R.5th 747.  
Substitution of judge in state criminal trial, 45 A.L.R.5th 591.
- 2 U.S.—*U.S. v. Santos*, 588 F.2d 1300 (9th Cir. 1979).  
  
**Compliance even though certification not filed**  
Iowa—*State v. Voelkers*, 547 N.W.2d 625 (Iowa Ct. App. 1996).  
  
**Certification adequate**  
Wyo.—*Vit v. State*, 909 P.2d 953 (Wyo. 1996).  
  
**Successor must read and consider all relevant portions of record**  
N.D.—*Weigel v. Weigel*, 1999 ND 55, 591 N.W.2d 123 (N.D. 1999).
- 3 Mich.—*People v. McCline*, 442 Mich. 127, 499 N.W.2d 341 (1993).  
  
**Better practice to grant continuance**  
La.—*Sparacello v. Andrews*, 501 So. 2d 269 (La. Ct. App. 1st Cir. 1986), writ denied, 502 So. 2d 103 (La. 1987).  
  
**New criminal trial may be required**  
U.S.—*U.S. v. Colon-Munoz*, 318 F.3d 348 (1st Cir. 2003).
- 4 Ill.—*People v. Wembley*, 342 Ill. App. 3d 129, 277 Ill. Dec. 382, 796 N.E.2d 97 (1st Dist. 2003).

5 Ind.—Eagan v. State, 480 N.E.2d 946 (Ind. 1985).

6 Colo.—People v. Rodriguez, 786 P.2d 472 (Colo. App. 1989).

7 N.Y.—People v. Hampton, 21 N.Y.3d 277, 970 N.Y.S.2d 716, 992 N.E.2d 1059 (2013).

8 N.C.—Girard Trust Bank v. Easton, 12 N.C. App. 153, 182 S.E.2d 645 (1971).

9 Ind.—Gunter v. State, 605 N.E.2d 1209 (Ind. Ct. App. 1993).

**Stipulation of parties**

Ind.—In re Eiteljorg, 951 N.E.2d 565 (Ind. Ct. App. 2011).

10 N.D.—Weigel v. Weigel, 1999 ND 55, 591 N.W.2d 123 (N.D. 1999).

11 Fed. R. Crim. P. 25(a).

**A.L.R. Library**

Substitution of judges under Rule 25 of Federal Rules of Criminal Procedure, 73 A.L.R. Fed. 833.

12 Fed. R. Crim. P. 25(b)(1).

13 Fed. R. Crim. P. 25(b)(2).

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